

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

against

THE STATE OF NEW YORK,

Appellant,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

**MOTION OF THE STATE OF NEW YORK
TO INTERVENE**

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Supreme Court, U.

FILED

FEB 8 1975

MICHAEL RODAK, JR.

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TO INTERVENE**

The State of New York, a sovereign state of the United States of America, by and through its Attorney General, moves the Court for an order permitting it to intervene in the above entitled appeal, in which probable jurisdiction has been noted, and permitting the State of New York to file a brief in support of the constitutionality of its statute, Criminal Procedure Law, § 320.20(3)(c), and to participate in oral argument.

1. The only question involved on this appeal and the sole predicate of jurisdiction is whether § 320.20(3)(c) of the New York Criminal Procedure Law which authorizes a trial judge to prohibit closing argument in a non-jury trial is

violative of the due process clause of the Fourteenth amendment and the right to counsel provision of the Sixth amendment.

2. The State of New York is the real party in interest on this appeal which involves the constitutionality under the United States Constitution of a New York state statute duly enacted by the New York State Legislature.

3. The Attorney General did not participate in the proceedings in the New York State courts but now seeks to intervene in this Court on behalf of the sovereign state of New York in his statutory capacity, as a result of his statutory duty "[w]henever the constitutionality of a [New York State] statute is brought into question . . . it shall be the duty of the attorney general to appear in such action or proceeding in support of the constitutionality of such statute" (New York Executive Law, § 71) which right has been recognized by this Court (see Rule 42).

4. Since this appeal involves the constitutionality of a New York State Statute, it is important that the views of the chief legal officer of the State be presented to this Court. In addition the present representation is by the District Attorney of Richmond County whose primary interest is only upholding the judgment of conviction of the state court. The judgment of this Court may well affect a large number of nonjury criminal trials conducted in the State of New York since September 1, 1971, the effective date of the statute, and is therefore of vital interest to the State of New York.

5. At the present time the Attorney General of the State of New York is preparing his brief on behalf of the State of New York in support of the constitutionality of the New York State Statute, which, subject to the Court's permission will be filed before the end of the week of February

10th, 1975. The District Attorney of Richmond County supports the intervention of the State of New York in this cause, by the Attorney General of the State of New York.

6. In view of the paramount state interest herein involved leave is further requested to participate in the oral argument of this appeal, which participation has been consented to by the present attorney for the appellee, the District Attorney of Richmond County, without exceeding the time heretofore allotted to the appellee for the argument of this appeal.

7. In the alternative, leave is requested to file an amicus curiae brief by the end of the week of February 10th, 1975, pursuant to Rule 44, and for permission to argue this appeal on behalf of the State of New York pursuant to Rule 44, without exceeding the time heretofore allotted to the appellee for the argument of this appeal.

WHEREFORE, the State of New York prays leave to intervene, to file its brief, and to participate in oral argument.

Dated: New York, New York, February 7th, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Pro Se Pursuant to
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Law §71*

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